BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SAMMAMISH PLATEAU WATER AND SEWER DISTRICT, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and PORT BLAKELY COMMUNITIES, Respondents.	PCHB NO. 05-145 ORDER ON STAY DISSENT

I respectfully disagree with my colleagues primarily because they allow an overriding public interest to be demonstrated under the stay criteria through generalized statements of concern, which is in contrast with past Board decisions. Under RCW 43.21B.320(3) and WAC 371-08-415(4), the appealing party requesting the stay makes a prima facie case for the stay if that party is able to demonstrate either a likelihood of success on the merits of the appeal or irreparable harm. Once a prima facie case for a stay is made, the burden then shifts to the agency to demonstrate either a substantial probability of success on the merits, or a likelihood of success and an overriding public interest which justifies denial of the stay.

In the case at hand, the entire Board agrees that the Sammamish Plateau Water and Sewer District (District), as well as the Department of Ecology and Port Blakely Communities (Respondents), have demonstrated a likelihood of success on the merits of the appeal. The majority, however, contends that the Respondents have also shown an overriding public interest

that justifies the denial of the stay. I believe this determination by the majority is largely accomplished by shifting the burden of proof back to the Appellant District.

In support of its finding that the Respondents have an overriding public interest in denying the stay, the majority opinion points to the need to recharge the LIV aquifer, avoiding damage to creek habitat, and protecting residents from increased flows and flooding. Order on Stay, p. 19. The majority opinion cites to the Declarations of Keith Niven and Mayor Ava Frisinger as the basis for this finding. Id. at p. 5. The majority opinion then concludes that "[t]hese impacts were effectively unrefuted on the record of this motion." Id. at p. 19.

A close reading of the declarations pertaining to these alleged impacts, however, shows their speculative nature. Mr. Niven, who is the Program Manager within the Department of Public Works Engineering for the City of Issaquah, states that "[i]f the stormwater from the Highlands is not allowed to recharge the aquifer, it is *believed* there will be an impact on the potable water supplies." (emphasis added). Mr. Niven also states that "[b]eyond the *potential* impact to the potable water supply, diverting all of the stormwater runoff from Issaquah Highlands to area surface waters *could* result in an impact on fish habitat, stream corridor vegetation and *could* exacerbate winter and springtime flooding concerns from property owners . . . ." (emphasis added).

Mr. Niven's opinions regarding potential impacts if the LRIG is not used for infiltrating stormwater are not only equivocal, but are predicated upon no future use of the LRIG for infiltration rather than a short period of interrupted use of the LRIG for infiltration. Mayor Frisinger's Declaration is merely an acknowledgment of Mr. Niven's opinions coupled with a

conclusory statement that the City of Issaquah has an overriding public interest in recharging the LIV aquifer. The majority opinion treats these bare declarations, unsupported by any documentation showing potential impacts for a short-term interruption, as a verity. Appendix D to the Two-Party Grand Ridge Agreement[1] (Two-Party Agreement) indicates that "project runoff will be detained and *released at a controlled rate* to nearby surface water systems . . . ." (emphasis added.) Appendix D at p. D-8. No evidence was introduced indicating that stormwater could no longer be released at a controlled rate to nearby surface water systems, or that the necessary rate of release would cause scour, etc., if infiltration through the LRIG is temporarily disrupted.[2] Perhaps the harms alleged by the Respondents are unrebutted by the District because they are also unsubstantiated.

This Board has historically required a greater showing by the Respondents in order to demonstrate an overriding public interest. In a recent Board decision, one Board member observed in a separate concurrence that the burden was on the public agencies to come forward and make a showing of overriding public interest, and stated that the '"overriding public interest" requirement applicable only to the agency becomes the tiebreaker.' *Port of Vancouver, et al. v. Ecology and Clark Public Utilities*, PCHB Nos. 03-149 & 03-151, p.2 (Order Granting Stay Concurring Opinion) (November 26, 2003).

When presented with specific facts substantiating a particular harm to be avoided, the

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[1] The Two-Party Grand Ridge Joint Agreement was executed between the City of Issaquah and the Grand Ridge Partnership and the Glacier Ridge Partnership on June 19, 1996. Second Declaration of Ame Wellman in Response to District's Motion for Summary Judgment. Appendix D is attached as Ex. A to this Declaration.

[2] The system design itself calls for a bypass to the LRIG to prevent contaminants from reaching the ground water. The bypass discharges to nearby surface waters. Appendix D, p. D-8.

Board has found an overriding public interest. In *Blohowiak, et al. v. Seattle-King County Department of Public Health, et al.*, PCHB No. 99-093 (Order on Motions for Partial Summary Judgment and Stay) (September 28, 1999), the Board found that there was an overriding public interest to allow the use of a new landfill prior to the hearing on the merits because there was evidence introduced that the existing landfill would reach capacity well in advance of the hearing and there was no alternative permitted location for the disposal of the waste. Similarly, in *Washington Toxics Coalition v. Ecology, et al.*, PCHB Nos. 06-011, 06-020, 06-022, and 06-023 (Order Denying Stay) (June 6, 2006), the Board noted that failing to spray aquatic weeds would raise safety concerns for swimmers and boaters, interfere with irrigation programs, and damage the aquatic ecosystem.

In contrast, the Board found no overriding public interest in continuing with a construction schedule to prevent delays and additional costs for the development of an airport runway, *Airport Communities Coalition v. Ecology and the Port of Seattle*, PCHB No. 01-160 (Order Granting Motion to Stay the Effectiveness of Section 401 Certification) (December 17, 2001); or in delaying the development of a wellfield project when presented with little evidence of potential harm. *Port of Vancouver, et al. v. Ecology and Clark Public Utilities*, PCHB Nos. 03-149 & 03-151 (Order Granting Stay) (November 26, 2003). Both of these cases involved major public works projects of great interest and potential benefit to the public.

In a case previously before this Board involving a proposed stay, the Board found "that statements of concern regarding increased flow and contamination as submitted by the appellants are not sufficient to meet the required showing for a stay." *McKenna v. Ecology*, PCHB No. 00-

054 (Order Denying Stay) (June 28, 2000). Similarly, I would find that generalized statements of concern are not sufficient to demonstrate the required showing of an overriding public interest.

In addition to my primary concern regarding the majority's application of the stay criteria, I also disagree with their analysis of certain facts. The majority opinion accepts the assertion by the Respondents that the absence of a functioning bioswale as identified in the fact sheet for the permit is insignificant because the bioswale is not a key component of the LRIG infiltration gallery. The basis for this finding is a statement by Ecology's permit writer that discharges could occur without the bioswale because the "bioswale was an added protection." Declaration of James Tupper in Support of Second Motion for Stay, Ex. 2, Deposition of Monika Kannadaguli, p. 45 (August 3, 2006).

In this same deposition, the permit writer acknowledges that she does not know why the LRIG was constructed, id. at p. 26, and did not review the final EIS. Id. at p. 31. Ms. Kannadaguli also admits that she did not know that the LRIG was close to the District's drinking water well until it was brought to Ecology's attention after the filing of this appeal. Id. at 74. Furthermore, Ecology's hydrogeologist associated with the water quality program for the region was not consulted about this project until after the permit was finalized. Deposition of Rodney Thompson, p. 8 -10 (July 21, 2006). Therefore, when the permit writer asserts that the bioswale is "an added protection", it is not clear whether she is taking into account that the eventual LRIG discharge point is so close to the District's well. I would not give as much deference to the permit writer's opinion regarding the importance of the bioswale because it appears her

knowledge of the overall operation of the infiltration system is limited, and she did not consult with the in-house expert prior to finalizing the permit.

Other evidence, in contrast, points to the importance of the bioswale. The fact sheet for this permit says "Construction stormwater is treated for turbidity, pH, and petroleum hydrocarbons prior to site discharge. Treatment is primarily through settling in regional detention/water quality ponds, or nutrient uptake in the Lower Reid bioswale."[3] The Final EIS lists the proposed use of biofiltration swales as part of the latest BMPs for water quality mitigation.[4] Under the Respondents' own argument that the Permit constitutes AKART, the use of a bioswale as AKART for the treatment of stormwater can be inferred from an excerpt in a section of an appendix to the Two-Party Agreement, which states "Stormwater treated in bioswales is designed in compliance with the King County Stormwater manual."[5] Declaration of Niven in Response to District's Motion for Summary Judgment, Ex. C. I am not aware of the use of settling ponds by themselves as a BMP for petroleum hydrocarbons. Petroleum "sniffers" to detect concentrations of petroleum hydrocarbons also are not installed in the Reid Pond. Second Declaration of Jim Berger in Response to District's Motion for Summary Judgment, p. 3. The majority states that "at this point, the potential for degradation of the LIV aquifer from the infiltration of construction stormwater at the LRIG is unsubstantiated by scientific evidence."

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[3] Declaration of James Tupper in Support of Second Motion for Stay, Ex. 9, Fact Sheet for NPDES Permit WA-003188-7, Issaquah Highlands Project, p. 7.

[4] Declaration of John Ruple in Support of District's Motion for Summary Judgment, Ex. 10, Grand Ridge Final Environmental Impact Statement, p. S-10 (September 1995).

[5] Ecology considers the King County Surface Water Manual to be equivalent to the 2005 Western Washington Stormwater Manual. Kannadaguli Deposition, supra, p. 77-78.

Order on Stay, p. 19. However, high levels of turbidity, which is a pollutant associated with construction stormwater, have been identified in numerous samples collected at two different LRIG stations. One sample showed turbidity levels at a maximum of 663 NTU – well in excess of the 100 NTU limit established by the Issaquah development review team. Declaration of Carr in Support of Motion for Summary Judgment, p.6. Without a functioning bioswale, there does not appear to be adequate treatment in operation to address all of the parameters of concern for construction stormwater.

Finally, I believe based upon the additional evidence provided in this Second Motion for Stay, that the failure to monitor and control pollutants associated with municipal stormwater, which is co-mingled with the construction stormwater without any apparent regulatory restrictions,[6] violates both AKART and the Anti-Degradation Policy of WAC 173-200-030.

The state's Anti-Degradation Policy for groundwater is the maintaining and protection of existing and future beneficial uses, such as drinking water, from degradation of water quality that would interfere with or become injurious to those beneficial uses. WAC 173-200-030(2)(a). WAC 173-200-030(2)(c)(ii) requires all contaminants that will reduce the quality of groundwater are subject to AKART prior to entry into the groundwater. The design standards for the project are supposed to maintain present quality of groundwater in compliance with the state's Anti-Degradation Policy. Two-Party Agreement, Appendix D, p. D-24-25.

Section S2 of the Permit requires compliance with the Ground Water Quality Standards

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[6] Municipal discharges "will ultimately be covered" by the proposed general permit for small municipal systems. Port Blakely's Response to District's Motion for Summary Judgment, p. 6.

found in Chapter 173-200 WAC. The Permit defines "compliance" as meaning that "stormwater discharges *from this facility* will not cause or contribute to a violation of water quality standards in the receiving water." (emphasis added). The "facility" in the case at hand includes the LRIG infiltration system. Urban runoff is currently directed through the LRIG. Deposition of Kannadaguli, p. 61-62. The purposeful co-mingling of the urban stormwater with the construction stormwater into a facility requires the eventual discharge from that facility to comply with all water quality standards, not just those that are most likely to be found in construction runoff. As acknowledged by the environmental engineer responsible for supervising the industrial permits and stormwater unit at Ecology's Northwest Regional Office, there are not separate groundwater quality standards for construction-related discharges and other discharges to groundwater. Declaration of James Tupper in Support of Second Motion for Stay, Ex. 4, Deposition of John Drabek, p. 12 (August 3, 2006). The Anti-Degradation Policy is an enforceable requirement of the Permit at issue and is therefore well within the Board's jurisdiction in this case.

The concerns over potential groundwater pollution in this area are well-documented. The Final EIS for the Grand Ridge development specifically states that "[g]roundwater quality in the shallow and deep aquifer could potentially be affected by the stormwater infiltration systems." It further finds that "[g]roundwater quality of the shallow and deep aquifer also may potentially be impacted by surface activities at the site. Accidental spills of oil, gasoline, *pesticides and fertilizers*, or other chemicals could adversely affect groundwater quality if they are not contained and quickly cleaned up." Declaration of John Ruple in Support of District's Motion

for Summary Judgment, Ex. 10, Grand Ridge Final Environmental Impact Statement (FEIS), p. S-9 (September 1995). (emphasis added). The use of pesticides and fertilizers are associated with urban development.[7] The FEIS also states that concentrations of copper, lead, zinc, and fecal coliform bacteria may be expected to increase "up to several times higher than existing background concentrations." FEIS at p. p. 37. Ecology, nevertheless, is currently allowing urban stormwater to be discharged into groundwater within 600 feet of a District well despite the discharge being largely untreated and with little monitoring for water quality.[8] Ecology maintains that it is entitled to a presumption that its approach to curbing the effects of stormwater through the use of BMPs meets the Antidegradation Policy. Ecology's Motion for Partial Summary Judgment, p. 8. This presumption, however, should not apply if the BMPs for urban stormwater do not exist as part of this stormwater discharge system.

Recent microparticulate analysis of groundwater samples taken from a monitoring well near the LRIG also point to the influence of surface water on the groundwater. The results showed large increases in levels of algae and ciliates and indicate the water supply is at "high risk." Declaration of Scott E. Coffey in Support of Second Motion for Stay. Ecology's

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[7] Ecology's hydrogeologist noted that pesticides and fertilizers are things they look for in urban runoff. Deposition of Thompson, p. 23.

[8] There is not only a lack of monitoring for pollutants associated with urban stormwater, no water quality monitoring is being conducted in wells. Ecology's Implementation Guidance for the Ground Water Quality Standards, Ex. 8 at p. 41-42, Declaration of James Tupper in Support of Second Motion for Stay, states that monitoring wells are generally needed to have an effective monitoring plan, and compliance wells must be located hydraulically downgradient of the discharge. Ecology also admits that there should be monitoring wells to monitor water quality. Deposition of Kannadaguli, p. 75. The three monitoring wells in the area are for monitoring the water table. Id. at p. 81-82. Although the Condition S3 of the Permit requires monitoring to be conducted pursuant to the "approved monitoring plan", no such approval has ever occurred. Id. at p. 66.

hydrogeologist for this region recently advised the permit writer that there is potential for groundwater contamination from the LRIG because the water wasn't being treated to groundwater standards at the point of discharge. Deposition of Thompson, p. 22. It appears that the LRIG is in a one-month travel time period from the District's well. Deposition of Kannadaguli, p. 35-36. The Washington State Department of Health has wellhead protection requirements for infiltration facilities upgradient of drinking water supplies and within 1, 5, and 10-year time of travel zones. Id. at p. 57. The one-month time of travel zone for pollutants at this site clearly puts the District's well at risk for contamination.[9] The majority opinion declares all of this information as "very general evidence," and notes that "no contamination has been detected in the District's production wells." Order on Stay, p. 19. The District is not required to show an actual and substantial injury in order to obtain a stay.[10] Although there is conflicting evidence about the adequacy of the vadose zone for treatment, I believe that the District has met its burden of showing the need for a stay to issue, and there is no showing of an overriding public interest by the Respondents to deny the stay's issuance.

I respectfully DISSENT and would grant the stay requested in the Appellant's motion.

Dated this 20th day of December 2006.

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[9] I would also find that the King County Surface Water Manual is not equivalent with the Western Washington Stormwater Manual because of the lack of the Site Characterization Criteria in King County's Manual. Ecology's hydrogeologist for this region admitted that the site characterization criteria are part of AKART. Deposition of Thompson at p. 38. As a consequence, there is failure to comply with AKART.

[10] The Board's stay criteria are different than the standards for obtaining a preliminary injunction as set forth in *Tyler Pipe Indus. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

WILLIAM H. LYNCH, Chair